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ABSTRACT

The author discusses the legal and extra-legal restrictions placed on public broadcasting stations, with respect to dissemination of political information. Although public broadcasting systems presumably exist as an alternative medium free of the commercial and time pressures that commercial stations face, the author claims that restrictions on the public media hinder their activities, particularly with respect to the furnishing of political information. He cites studies that reveal extra-legal constrictions on public broadcasters, such as: (1) the lack of a permanent financing plan, (2) the lack of hope that sufficient funds will be provided, (3) the background of those involved in public broadcasting, (4) varied views on the mission of public broadcasting, and (5) the small size of the public broadcasting audience. He examines two matters of concern to public broadcasters: first, the attempt by the state of Maine to ban programs of a political nature from a university station, and second, current problems in obtaining sufficient funds from federal sources. (Author/RN)

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POLITICAL BROADCASTING ON PUBLIC RADIO AND TELEVISION STATIONS: FIRST AMENDMENT IMPLICATIONS

A paper presented to the 1972 Convention of the Speech-Communications Association

by:

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Presumably, Public Broadcasting, the nation's non-commercial publicly financed radio and television stations, and their supporting mechanisms including the Corporation for Public Broadcasting and the interconnected network, the Public Broadcsting System, exist to provide an alternative to the commercial system. It follows logically, that its approach to the coverage of political campaigns and other controversial subjects could offer viable alternatives in the form, time, and content devoted to such matters.

The 1967 Report of the Carnegie Commission on Educational Television which led directly to the Federal legislation creating our current system certainly considered coverage of contemporary affairs an essential part of public television. The Commission reported that "public television can extend our knowledge and understanding of contemporary affairs. Its programming of the news should grow to encompass both facts and meaning, both information and interpretation."[1] To the Commission, public television was the instrument that could provide the depth of understanding that the encapsulated news packaged by the commercial networks lacked.

Broadcasting has always had relatively fewer freedoms than other media. Primarily, the justification for such regulation has been founded on the concept of a relatively limited frequency spectrum belonging to the people as a natural resource. Anyone could start a newspaper, the theory goes, but an ultimate few could enter the limited air space available for radio and television. Statistics belie the theory since over 7000 radio stations and 900 plus television stations are currently on the air in comparison to about 1260 daily newspapers.

In the case of Public Broadcasting, freedoms have been constricted even further. For example, a provision of the Public Broadcasting Act of 1967 prohibits editorials by non-commercial stations,[2] a freedom won over

twenty years ago by commercial broadcasters after an eight year battle with the Federal Communications Commission over its 1941 Mayflower decision banning the right of advocacy for broadcast licensees.[3] In its 1949 report, "Editorializing by Broadcast Licensees," the FCC declared that because of the public's right to be informed, it was the "affirmative duty" of the licensee to seek out controversy, take stands on issues, and afford opportunity for those holding contrary views.[4] But what the Constitution and later the FCC giveth, the Congress taketh away, at least for public broadcasters.

POLITICS AND BROADCASTING

In the political arena, great claims were made for the potential of radio and television to revolutionize the political process. Some believe the revolution in fact occurred. Wheeler, for example, writing at the time of the 1968 election, suggested that television has had a profound effect on American politics and "is not only making the two party system irrelevant, it is also producing a new political coalition and new systems of campaign contributions."[5]

In contrast, Chester, in his historical treatise, Radio, Television and American Politics, noted that the revolutionary claims made for political radio, a majority of which were carried forth to television, have been largely unfulfilled. These included claims that radio would end "political barnstorming and the old style of political oratory; halt emotional appeals and mass rabble rousing; project political personalities; nationalize politics; make politics more democratic; streamline conventions and shorten campaigns, be a more politically neutral medium than newspapers and revolutionize politics."[6]

Chester suggested that both radio and television have expanded and altered but hardly revolutionized politics. In fact, according to Chester, in certain respects television has even had a "retrogressive rather than a progressive impact...one need only cite the exhorbitant cost of video time, its subordination of the issues to political personalities, the growing superficiality and brevity of political discourse, its failure to offer more of an outlet for minority and extremist views, the spurious claims it makes of political neutrality, to demonstrate that the new idol does indeed have feet of clay."[7]

Indeed, a web of political broadcasts economics enmeshed by the equal time provision of Section 315 of the Communications Act of 1934 and the Federal Communications Commission promulgated Fairness Doctrine has served to relegate political campaign broadcasting to the strategems of the advertising agency. Increasingly, series of purchased short "spot" announcements are employed in favor of longer programs. The national election of 1968 reached a watershed in this regard. It has been estimated that no less than five million airings of paid political advertisements saturated the nation's airwaves that year. A spot announcement is less costly, and considered to be more compelling by modern campaign executives who are more interested in "selling" than informing.[8]

There is some indication that the crest of political "spot" advertising may have been reached during the 1968 and 1970 campaigns. The major influence has been the new Federal Election Campaign Act of 1971 which went into effect on April 17, 1972. Among other things, the Act limits the amount political candidates can spend on communications media to 10¢ per eligible voter of which 6¢ may be designated for broadcasting.[9] Some campaign consultants argue, however, that the reforms of the Federal Election Campaign Act will not

eliminate money as a major criterion for political success but rather force political candidates to redirect their money. For example, few of the services provided by computers are limited by the new law. In any event, a major direct effect of the Act will be to limit a perceived extravagance in political advertising rather than promoting new methods for the electorate to gain political information.

While it is too early to analyze the financing of the 1972 Presidential election campaign, the most recent figures released by the General Accounting Office indicated that President Nixon devoted almost $4.4 million of a total $35.2 million to broadcasting, down from $15.6 spent on broadcasting in 1968. George McGovern outspent the President on broadcast media channeling $6.0 million to broadcasting of his total of $18.5 million. The Democrats spent $10.9 on broadcasting in the Presidential race in 1968.[10]

In 1972, the five and thirty minute television political commercials gained popularity. Nixon aired 40 one-minute spots on network television, 74 five-minute spots plus four thirty-minute programs. McGovern had 35 one-minute television commercials, 49 of five-minute length, and 9 of the thirty-minute variety.[11]

As time devoted to purchased spot announcements increased to its crest in 1968, the time devoted to sustaining or free time in public affairs programming decreased markedly. For example, network television devoted 39 hours 22 minutes to political public affairs programming in 1960, 4 hours and 28 minutes in 1964 and 3 hours and 1 minute in 1968. A slighter decrease was noted in network radio.[12] Preliminary estimates indicate the figures may show a slight upswing in 1972 although at the Presidential level programming involving the appearance of the only generally available candidates, McGovern and Shriver, predominates. McGovern accepted 9 network television news pro-

gram invitations and Schriver, 6. In contrast, Agnew accepted 2 invitations while Nixon rejected all invitations.[13]

It is the libertarian assumption that one must be presented with all matter of evidence and opinion, to serve as a basis for making political decisions, that undergirds the American political process. Yet in commercial broadcasting, relied upon by so many Americans for their primary source of news,[14] the over-abundance of political information is directly attributable to paid advertising from the candidates themselves. The free flow of information has become a paid stream of political commercials.

POLITICS AND PUBLIC BROADCASTING

Curiously, the political broadcasting issues to which various foundations, study groups, academicians, political observers, and the Congress have been addressing themselves have centered exclusively on the functions, responsibilities, and obligations of the commercial broadcasters. Little has been said about the nation's non-commercial "educational" or "public" broadcasting establishment.

E. B. White, in an introductory note to the Carnegie Commission Report that ultimately led to the establishment of "public" broadcasting, dreamed that public television "...should be our Lyceum, our Chautaqua, our Minsky's and our Camelot. It should restate and clarify the social dilemma and political pickle. Once in a while it does, and you get a quick glimpse of its potential."[15]

More recently, a special task force of the National Association of Educational Broadcasters proposed that:

> ...Educational Broadcasting can be a major instrument in the improvement in the political process, defined narrowly in terms of party campaigning and governmental decisions. It can slow down, perhaps even reverse, the trend toward emphasizing politicians' access to the media rather than

> the people's access to the politicians. By providing the voters opportunities to see the candidates exposed to sharp questionings, interviews and discussions, educational (public) broadcasting can work to make campaigning more nearly a species of discussion, debate, examination, and education, and less a species of advertising...[16]

How then has public broadcasting responded to its potential to serve the political process? Again, it is too early to assess what happened in 1972. In 1968, Mendelsohn and Muchnik conducted a mailed questionnaire survey of public television executives whose stations were reported to have been on the air during the election campaign. Of the 163 stations on the air during the campaign period, 133 respondees reported that they devoted less than 2% of all programming to the 1968 election campaign. Reasons cited by station executives (44% claimed commercial television was doing an adequate job, 31% reported that it was the explicit policy of their station not to cover political campaigns) led to the conclusion that public television is not providing alternatives to the political broadcasting practices of commercial television.[17] In fact, 69% of the public television executives rated their own station's efforts as "fair" or "poor" while only 13% considered coverage of the political campaign "excellent" or "good."

In addition, a series of interviews with those charged with creating public policy in this area have identified a number of perceptions and extra-legal constrictions upon public broadcasters including (1) the lack of a permanent financing plan, (2) the lack of hope that sufficient funds will ever be provided, (3) the background of those involved in public broadcasting, (4) varied views on the mission of public broadcasting, and (5) the small size of the public broadcasting audience.

One could also analyze the laws and regulations surrounding public broadcasting to determine whether in fact they serve the political process by promoting or inhibiting free speech principles. Besides considering the regula-

latory framework that applies to all of broadcasting, commercial and non-commercial alike, i.e. Section 315 of the Communications Act of 1934, the FCC's Fairness Doctrine, and the Red Lion decision, those cases involving citizen's groups standing before the FCC at the time of license renewal, there are areas peculiar to public broadcasting.

Two in particular will be considered in this paper. The first involves a State's attempt to ban programs of a political nature, an attempt that has since been ruled unconstitutional. The second which pales all other free speech considerations by comparison is concerned with the funding of Public Broadcasting itself.

STATE OF MAINE versus UNIVERSITY OF MAINE

The Maine State legislature in 1961 created the Maine Educational Television network and authorized the University of Maine to implement provisions of the Act. One controversial provision prohibited the network from broadcasting programs which in any way promoted political and governmental activities.

By late 1969, the network was heavily involved in public affairs programming and formulated plans to have all major candidates in the June, 1970 primary make appearances on the network. It was at that point that the Attorney General of the State, who incidentally was also a candidate for Governor, offered an informal opinion that the broadcast plans might be in violation of State law. Following the actual appearance of the first candidate, the Attorney General moved to enforce the State statute.

The University of Maine, as licensee, then agreed to abandon its broadcast plans and to have the matter adjudicated in the State Supreme Court. The University case consisted of three major arguments:

(1) The First Amendment guarantees of free speech.

(2) Federal preemption of broadcast regulation.

(3) Vagueness of the language and intent of the State statute.

In overturning the Maine Statute, the Maine Supreme Court pointed to the folly of banning programs on educational television which are "by their very nature essential in the educational process. "The Court continued:

> In our view, although the State has a valid surviving power to protect its citizens in matters involving their health and safety or to protect them from fraud and deception, it has no such valid interest in protecting them from the dissemination of ideas as to which they may be called upon to make an informed choice. In the latter area, Congress has preempted the field...[18]

The Court thus ruled only on the basis of Federal preemption and did not treat the First Amendment and vagueness issues raised by the University of Maine. It should be noted that the Maine statute is almost identical in wording to a Florida statute currently in force. Florida, however, prior to the Maine case had passed statutes allowing for an experimental period of political broadcasting on non-commercial stations supported in part by Florida revenues.

FUNDING OF PUBLIC BROADCASTING

The funding problems of Public Broadcasting came to a head two years to the day after the Maine Supreme Court decision when President Nixon vetoed a two year $165 million appropriation bill for the Corporation for Public Broadcasting. The theory was that funding in chunks of two or more years could provide a degree of insulation not possible with an annual appropriation.

A long range financing plan was initially supported in the early days of the Nixon administration. But then the Administration objected to creation of the National Public Affairs Center for Television and to its senior cor-

respondents Sander Vanocur and Robert MacNeil. It questioned whether programs of controversy should properly be aired on public broadcast outlets and also raised the issue of excessive centralization by the Corporation for Public Broadcasting.

The Carnegie Commission of 1967 had envisaged insulation in the funding of public broadcasting that would protect this alternative broadcast service from attempts at political control The Commission's initial funding proposal was for the levying of an excise tax on television receivers.

In the subsequent Congressional hearings considering the Public Broadcasting Act of 1967, others expressed concerns about funding mechanisms and the potential for political control of or reprisals for programming. Current Senate minority leader Hugh Scott worried about the potential for Federal control suggested shifting emphasis to the private enterprise phase of the bill to ensure that the Corporation for Public Broadcasting had the maximum protection in its programming efforts, "...the protection of the oddball, beatnik, crackpot, jackass, fool; the right to be unpleasant, to be different, to be arrogant, to be wrong."[19]

The American Civil Liberties Union was cautious in its provisional endorsement of the bill calling for safeguards to ensure the diversity of ideas. One safeguard proposed was that a blue ribbon panel rather than the President choose the members of the Corporation. A year after passage of the Bill, the ACLU urged adoption of a tax revenue base to support Public Broadcasting.[20]

Former CBS news director Fred Friendly, also worried about political influence and the funding process suggested that no government money should be involved in that portion of public broadcasting devoted to public affairs programming. While not providing a way of administering his proposal, Friendly warned, "Of one thing we can be certain: Public Television

will rock the boat...but public television should not have to stand the test of political popularity at any given point in time. Its most precious right will be the right to rock the boat."[21]

And so it came to pass a scant five years later that public television and radio did rock the Nixon boat and the reprisals occurred as predicted.

The Nixon attacks on public television have come primarily through its Office of Telecommunications Policy. Antonin Scalia, OTP General Counsel, suggested that some kinds of controversial programming may be acceptable, particularly at the local level. In a Washington interview with this author in May, he went on to note that "the closer you get to documentary, the more trouble there will be with funding." Then should public television stay clear of political or controversial programming? Scalia replied, "I am not saying it should. It will if it doesn't want to commit suicide. I hate to see it go down the drain by doing this kind of programming, at least the way things are currently set up."[22]

A little more than a month later the not-so-veiled threat of political intrusion was uncloaked in the form of a Nixon veto of a two-year funding proposal initially promised by the Administration itself. The veto led to the resignation of John Macy, President of the Corporation for Public Broadcasting.

Ironically, Henry Loomis, plucked by Nixon from the Voice of America to replace Macy as head of the Corporation for Public Broadcasting, began immediately talking about more program control by the Corporation, not less as the previous Nixon admonitions would have led one to believe. One joke at the November national meeting of the National Association of Educational Broadcasters had the telephone in Loomis's new office being answered, "Good morning. National Center for Decentralization."

An example of how the Federal government might use a national television network for its own purposes came quickly to pass when the government offered to provide extensive government controlled coverage of the Apollo 17 Mission. One supposes that NASA worried about decreasing commercial coverage of the moon shots and facing its final Apollo Mission hoped to rally public support for its own funding. The offer, funneled by the Corporation for Public Broadcasting to local public stations received an immediate response. In sharply rejecting the offer, local stations told the Federal government to stay out of programming. Mr. Loomis might recall from his recent Voice of America days that the Congress worried about government control of media and its propaganda possibilities, specifically prohibited the programs of the Voice of America and the materials of the United States Information Agency from being propagated within the borders of the United States.

What may be needed to preserve the Republic is a greater diversity of ideas not a purging of all things potentially controversial. In a complex society, I would suggest what is needed is not less servicing of our information needs, but more; not fewer ideas of how to cope with the world, but more; not less money for an alternative television service, but more.

How much money are we talking about for public television? A recently released report for the Aspen Program on Communications and Society, the first independent evaluation of public television financing since 1967, calimed that "a balanced service, responsive to diverse audience needs" would cost $432 million to operate annually or just over $2.00 per person. By comparison, non-commercial British Broadcasting Corporation spends $3.29, and a Japanese non-commercial network spends $2.90 per person. The current level for funding for public telesision is $.74 per person.

What seems most needed if Public Broadcasting is to fulfill its potential in contemporary affairs coverage is a solution for financing public broadcasting that will provide protection of the public medium from the whims of politicians of any political party or any political persuasion. At public broadcasting's present rate of development, according to one critic, we will celebrate our 200th anniversary as a nation by watching a BBC-produced series on the American Revolution. And that revolution, you may recall, was fraught with controversy.

Footnotes

1. Carnegie Commission on Educational Television, Public Television: A Program for Action (New York: Harper & Row, 1967), pp. 95-96.

2. Public Broadcasting Act of 1967, Public Law 90-129, which added new Section 399 to the Communications Act of 1934.

3. In re the Yankee Network, Inc., 8 fcc 333 (1941)

4. U. S. Federal Communications Commission, "Editorializing by Broadcast Licensees," 14 Fed Reg. 3055 (1949).

5. Harvey Wheeler, "The End of the Two Party System," Saturday Review, Nov. 2, 1968, pp. 19-22.

6. Edward W. Chester, Radio, Television and American Politics (New York: Sheed and Ward, 1969) p. 288.

7. Chester, 309.

8. Joe McGinniss, The Selling of the President 1968 (New York: Trident Press, 1969).

9. U.S. Congress, Federal Election Campaign Act of 1971, 92nd Cong., 1st Sess., S. 382 and S. 986.

10. Broadcasting, November 13, 1972, p. 20
See also Herbert E. Alexander, Financing the 1968 Election (Lexington, Mass: D.C., Heath, 1971).
and U.S. Federal Communications Commission, Survey of Political Broadcasting Primary and General Election Campaigns of 1968 (Washington: Federal Communications Commission).

11. Broadcasting, November 13, 1972, p. 20.

12. Alexander, op. cit.

13. Broadcasting, November 13, 1972, P. 20.

14. The Roper surveys indicate an increase from 51% in 1959 to 60% in 1971 of Americans relying on television as a primary source of news. A recent survey by R. H. Bruskin Associates reported in Broadcasting, November 20, 1972, p. 17 indicates the figure is now 64%. According to the Bruskin survey, 50% consider television the most believable source of news while 20% cite newspapers as most believable.

15. E. B. White in Public Television A Program for Action, Report of the Carnegie Commission on Educational Television (New York: Harper & Row, 1967), p. 13.

16. Open Forum, "Educational Broadcasting and Public Responsibility," Report from a special task force of the National Association of Educational Broadcasters, Educational Broadcasting Review, V (December, 1971), 21-25.

17. Harold Mendelsohn and Melvyn M. Muchnik, "Public Television and Political Broadcasting: A Matter of Responsibility," Educational Broadcasting Review, IV (December, 1970), 4.

18. State of Maine v University of Maine. Law Docket 989. See also John R. Morison and Donald R. McNeil, "State Supreme Court Rules Political Programming may not be Restricted," and "Memorandum of the Federal Communications Commission as Amicus Cruiae," Educational Broadcasting Review, August, 1970, pp. 7-14.

19. U.S. Congress, Senate, Public Broadcasting Act of 1967, Hearing 90th Cong., 1st Sess., on H.R. 6736 and S. 1160 (Washington: Government Printing Office, 1967).

20. ibid. Also see Fred Powledge, "Public Television: A Question of Survival," ACLU Reports (Washington: American Civil Liberties Union, 1972), pp. A-3, A-4.

21. U.S. Congress, House, Public Broadcasting Act of 1967, Hearings, 90th Cong., 1st Sess., on H.R. 6736 and S. 1160, July, 1967 (Washington: Government Printing Office, 1967).

22. Statement by Antonin Scalia, personal interview with Melvyn M. Muchnik held in Washington, D.C., Office of Telecommunications Policy, May 22, 1972.